

STATE OF MICHIGAN
COURT OF APPEALS

FIFTH THIRD BANK,

Plaintiff/Counter-Defendant-
Appellant,

V

DANOU TECHNICAL PARK, LLC,

Defendant-Appellee,

and

SMD ESTATE, INC.,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED

March 20, 2012

No. 302884

Wayne Circuit Court

LC No. 09-031350-CH

Before: SAAD, P.J., and K. F. KELLY and M. J. KELLY, JJ.

K. F. KELLY. (*concurring*).

I concur with the majority's opinion, but write separately because I would also conclude that reversal is appropriate in light of the plain language of the contractual documents and the default or breach of contract by defendant Danou Technical Park, LLC (DTP).

I. Applicable Facts and Procedural History

On March 30, 2001, DTP entered into a collateral assignment of mortgage with plaintiff's predecessor, Old Kent Bank. The agreement provided in relevant part:

1. **Collateral Assignment.** Borrower [DTP] hereby assigns all of its right, title and interest in and to the API Mortgage to Lender [plaintiff], such assignment to be as additional collateral for payment by Borrower to Lender of the Old Kent Loan. Borrower further collaterally assigns to Lender the API Note. For the purposes of this Agreement, the API Note and the API Mortgage are sometimes collectively referred to as the "API Security Documents." Until the payment in full of all amounts due and owing under the Old Kent Loan, Borrower shall not give [sic] any consents, approvals or waivers under the API Security Documents without Lender's prior written consent which consent may be

withheld in its sole and absolute discretion. *Upon the occurrence of any event of default under the Old Kent Loan, the Lender may, at its option, assume the position of Borrower with respect to the API Security Documents and exercise all of Borrower's rights pursuant thereto, but in no event shall this Assignment be construed to obligate Lender to take any action with respect to the API Security Documents and exercise all of Borrower's rights pursuant thereto, but in no event shall this Assignment be construed to obligate Lender to take any action with respect to the API Security Documents or any obligation of Borrower with respect thereto. Following such an event of default, the Lender may deal directly with the API with respect to the API Security Documents without the prior consent or joinder of Borrower.*

* * *

4. **Release.** Upon payment in full of the Old Kent Loan, Lender shall release this Collateral Assignment.

* * *

8. **Appointment of Lender.** *Borrower hereby makes constitutes and appoints Lender its true and lawful attorney-in-fact, effective following an event of default, with full power of substitution, effective following the occurrence of any default, to take any action in furtherance of this Assignment, including without limitation, the signing of financing statements, endorsing of instruments, and, the execution and delivery of all documents and agreements necessary to obtain or accomplish any protection for or collection, disposition or enforcement of any part of the API Security Documents and the Exchange Agreement. Such appointment shall be deemed irrevocable and coupled with an interest. [Emphasis added.]*

On February 23, 2002, plaintiff and DTP executed a mortgage modification agreement. The purpose of the mortgage modification agreement was to reduce the principal amount of the API mortgage to \$5,250,000. This modification agreement expressly provided that “all other terms and conditions of the API Mortgage and Collateral Assignment shall remain in full force and effect.” It is undisputed that DTP defaulted on its obligation to repay plaintiff. Plaintiff purchased the disputed property at the foreclosure sale with a full credit bid, and DTP did not redeem the property.

On November 24, 2009, Samir A. Danou, president of defendant SMD Estate, Inc. (SMD), notified plaintiff that DTP had assigned its “rights to the API Mortgage and API Note” to SMD. The letter asserted that plaintiff was required to release the collateral assignment upon payment in full of the Old Kent Loan, and the loan was satisfied on May 6, 2009. This litigation ensued to quiet title to the property subject to the API mortgage and note.

II. Applicable Law

Issues regarding the proper interpretation of a contract or the legal effect of a contractual clause are reviewed de novo. *Fodale v Waste Mgt of Michigan, Inc*, 271 Mich App 11, 16-17;

718 NW2d 827 (2006). When interpreting a contract, the examining court must ascertain the intent of the parties by evaluating the language of the contract in accordance with its plain and ordinary meaning. *In re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). If the language of the contract is clear and unambiguous, it must be enforced as written. *Id.* A contract is unambiguous, even if inartfully worded or clumsily arranged, when it fairly admits of one interpretation. *Holmes v Holmes*, 281 Mich App 575, 594; 760 NW2d 300 (2008). Every word, phrase, and clause in a contract must be given effect, and contract interpretation that would render any part of the contract surplusage or nugatory must be avoided. *Woodington v Shokoohi*, 288 Mich App 352, 374; 792 NW2d 63 (2010). The intent of the parties is determined from the four corners of the contract. *Rogers v Great Northern Life Ins Co*, 284 Mich 660, 666; 279 NW 906 (1938). The contract must be construed as a whole, and all parts of the contract must be harmonized if possible. *Czapp v Cox*, 179 Mich App 216, 219; 445 NW2d 218 (1989).

“The essential elements of a contract are parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation.” *Mallory v City of Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). A substantial breach of a contract provides a basis to rescind the contract. *Rosenthal v Triangle Dev Co*, 261 Mich 462, 463; 246 NW 182 (1933). A substantial breach includes a failure to perform a substantial part of the contract or one of its essential terms or where the contract would not have been executed if default regarding a specific provision had been expected or contemplated. *Id.* “It is not every partial failure to comply with the terms of a contract by one party which will entitle the other party to abandon the contract at once.” *Id.* A merely technical breach does not fall within the class where rescission is permitted. *Id.* at 464. “One consideration in determining whether a breach is material is whether the nonbreaching party obtained the benefit which he or she reasonably expected to receive.” *Holtzlander v Brownell*, 182 Mich App 716, 722; 453 NW2d 295 (1990).

Generally, one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform. *Flamm v Scherer*, 40 Mich App 1, 8-9; 198 NW2d 702 (1972). However, the “first breach” rule only applies when the initial breach is substantial. *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994). A party who fails to perform a condition precedent of the contract loses the right to require the other party to further fulfill the terms of the contract. *Wolverine Packing Co v Hawley*, 251 Mich 215, 219; 231 NW 617 (1930). “Specific performance is a matter of grace, not of right.” *Id.* Consequently, when a party fails to make payments pursuant to the terms of an installment contract, the nonbreaching party is entitled to rescission of the contract and need not perform its own obligations. *Id.*

III. Application of Law to the Facts

Pursuant to the plain language of the collateral assignment, *In re Egbert R Smith Trust*, 480 Mich at 24, DTP is not entitled to a return of any right, title and interest in the API mortgage

and note because of its default.¹ DTP committed a substantial breach of contract by failing to repay plaintiff the outstanding obligation owed to it. *Rosenthal*, 251 Mich at 463. A party who first breaches a contract is not entitled to raise a claim premised on the other party's failure to perform. *Flamm*, 40 Mich App at 8-9. Additionally, a breaching party is not entitled to specific performance of the remainder of contract. *Wolverine Packing Co*, 251 Mich at 219.

According to the terms of the collateral assignment, DTP agreed that, in the event of default, plaintiff had the right to assume DTP's position. It was further agreed that in light of a breach, plaintiff was entitled to deal directly with API without the consent of DTP. Finally, upon DTP's default, plaintiff was appointed DTP's true and lawful attorney-in-fact. This appointment allowed plaintiff to be substituted in place of DTP and entitled it to "take any action" in furtherance of the collateral assignment. This appointment was irrevocable. Consequently, DTP assented to plaintiff's substitution in its place regarding any action to be taken with regard to the API security documents. DTP does not dispute the terms of the collateral assignment and its agreement to the terms. *Mallory*, 181 Mich App at 127. DTP does not dispute that it defaulted on its obligation. Therefore, DTP does not have any right, title or interest in the API security documents.

In light of DTP's agreement to the terms of the collateral assignment, it forfeited the right to pursue any action regarding the API security documents. Rather, the right transferred to plaintiff upon DTP's default. The fact that plaintiff did not seek to foreclose on the API security documents is irrelevant. In light of DTP's default, plaintiff held the right to enforce its own interests as well as the interest of DTP. DTP's breach or default precludes it from reacquiring the API security documents. Accordingly, I agree that the trial court's decision must be reversed.

/s/ Kirsten Frank Kelly

¹ This case may be resolved on the basis of the plain language of the mortgage modification agreement and collateral assignment, and the evidence of the parties' intent from the four corners of the documents. Accordingly, parol evidence need not be considered. See *NAG Enterprises, Inc v All State Indus, Inc*, 407 Mich 407, 409-410; 285 NW2d 770 (1979).